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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-796

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, REED ENTERPRISES, INC., LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement	4
Reasons for Granting the Writ	12
Conclusion	29

INDEX TO APPENDICES

Appendix A. Judgment and Opinion of the Court of Appeals	App. p. 1
Appendix B. Constitutional and Statutory Provisions Involved	4

TABLE OF AUTHORITIES CITED

Cases	Page
Bain, Ex parte, 121 U.S. 1	26
Bollenbach v. United States, 326 U.S. 607	22
Bruno v. United States, 308 U.S. 287	21
Chambers v. Mississippi, 400 U.S. 284	22
Davis v. United States, 417 U.S. 333	14
Delbridge v. United States, 262 F.2d 710 (D.C. Cir. 1958)	16
Giglio v. United States, 405 U.S. 150	16
Griffin v. United States, 336 U.S. 704	16
Hamling, et al. v. United States, 418 U.S. 87, Pet. for Rehear. denied Oct. 15, 1974, 95 S.Ct. 157	5, 10, 13, 14, 22, 24, 27
Kaplan v. California, 413 U.S. 113	22
Kaufman v. United States, 394 U.S. 217	23, 24
Kotteakos v. United States, 328 U.S. 750	22
Leary v. United States, 395 U.S. 6	18, 19
Little v. United States, 73 F.2d 861 (10 Cir. 1934)	22
Machibroda v. United States, 368 U.S. 437	23
Mejia v. United States, 291 F.2d 198 (9 Cir. 1961)	16
Napue v. Illinois, 360 U.S. 264	16
Newsom v. United States, 311 F.2d 74 (5 Cir. 1962)	16
Russell v. United States, 369 U.S. 749	26
Samuel v. United States, 169 F.2d 787 (9 Cir. 1948)	22
Scogin v. United States, 446 F.2d 416 (8 Cir. 1971)	19

Page

Smith v. Yeager, 393 U.S. 122 17

Stirone v. United States, 361 U.S. 212 26

Taylor v. Louisiana, 95 S.Ct. 692 23

Townsend v. Sain, 372 U.S. 293 .....17, 18

Turner v. United States, 396 U.S. 398 .....18, 19

United States v. Barber, 456 F.2d 579 (3 Cir. 1972) 29

United States v. Basurto, 497 F.2d 781 (9 Cir. 1974) 26

United States v. Daniels, 429 F.2d 1273 (6 Cir. 1970) 29

United States v. Goldstein, 502 F.2d 526 (3 Cir. 1974) 26

United States v. Halseth, 342 U.S. 277 25

United States v. Hamling, et al., 481 F.2d 307 ..4, 5

United States v. Hayman, 342 U.S. 205 23

United States v. Liquori, 438 F.2d 663 (2 Cir. 1971) 18

United States v. Mele, 462 F.2d 918 (2 Cir. 1972) 16

United States v. Miller, 411 F.2d 828 (2 Cir. 1969) 4, 13, 14, 16, 22, 23, 25

United States v. Neff, 212 F.2d 297 (3 Cir. 1954) 25

United States v. Scott, 425 F.2d 55 (9 Cir. 1970) 19, 20

Washington v. Texas, 388 U.S. 14 22

Weiler v. United States, 323 U.S. 606 22

Wilson v. United States, 250 F.2d 312 (9 Cir. 1958) 22

Page

Woosley v. United States, 478 F.2d 139 (8 Cir. 1973) 29

Yates v. United States, 354 U.S. 298 22

Miscellaneous

American Bar Association Project on Standards for Criminal Justice: Standards Relating to the Administration of Criminal Justice, "Sentencing Alternatives and Procedures", pp. 335-380; "Probation", pp. 381-405; "Appellate Review of Sentence", pp. 407-422 29

Rules

Federal Rules of Criminal Procedure, Rule 32(e) 4, 5, 27

Federal Rules of Criminal Procedure, Rule 33 ....4, 5

Statutes

United States Code, Title 18, Sec. 2 4

United States Code, Title 18, Sec. 371 4

United States Code, Title 18, Sec. 1461 4

United States Code, Title 18, Sec. 3651 ....4, 5, 27

United States Code, Title 21, Sec. 173 18

United States Code, Title 21, Sec. 174 18

United States Code, Title 26, Sec. 4701 18

United States Code, Title 28, Sec. 2255 .....3, 5, 10 .....14, 15, 19, 23, 24, 25, 26, 27

United States Constitution, Fifth Amendment .. 4, 19

United States Constitution, Sixth Amendment 4

United States Constitution, Eighth Amendment .. 4

Textbooks

8A Moore's Federal Practice, Par. 33.04, p. 33-27 15

2 Wright, Federal Practice and Procedure: Criminal, Sec. 557, p. 515 15

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., and Library Service, Inc., respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on November 4, 1975.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 4, 1975. On No-

vember 17, 1975, an application for a stay of the mandate of the Court of Appeals, presented to Mr. Justice Brennan and by him referred to the Court, was denied.

Questions Presented.

1. Whether the Court of Appeals erred in affirming the orders denying petitioners' motions for new trial upon the ground of newly discovered evidence where the record established by undisputed substantial and competent evidence that the standards of the community and vicinage of San Diego from which the jury was drawn were more tolerant of the depiction and representation of sex and nudity than those of the nation as a whole, and that such depiction and representation actually did not offend the standards of the said community, in the crucial years set forth in the indictment upon which the judgments of conviction rest.

2. Whether, in light of the fact that the indictment upon which the judgments of conviction rest, as amplified by the bill of particulars, specifically charged violations of national standards only; in light of the further fact that the case was tried solely upon the theory that national standards were violated and the jury instructed solely on national standards; and the fact that the trial judge repeatedly ruled that evidence of local standards was not admissible, the Court of Appeals erred in holding that the evidence offered by petitioners on the motion for new trial was not "newly discovered", when such undisputed evidence with respect to the greater tolerance of the San Diego community than the national community during the crucial years charged in the indictment could not previously have been offered in the light of existing law

and the rulings of the trial judge, was material to the issues, and was of such nature as would probably have produced an acquittal in the event of a new trial.

3. Whether the Court of Appeals erred in affirming the orders denying the motions to vacate the sentences and judgments of conviction in the habeas proceedings under 28 U.S.C. §2255 where the undisputed record established that Petitioners were never afforded adequate litigation on the crucial issue of whether the brochure involved herein offended contemporary local standards, the undisputed evidence in support of the motion establishing that the standards of the community and vicinage from which the jury was drawn were more tolerant than those of the Nation as a whole with respect to the depiction or representation of sex and nudity during the periods charged in the Indictment upon which the judgments of conviction rest.

4. Whether the Court of Appeals erred in affirming the order denying the motions to vacate the sentences and judgments of conviction in the habeas proceedings under 28 U.S.C. §2255, where the Indictment returned by the Grand Jury, as amplified by the Bill of Particulars, charged Petitioners solely with violating national standards and was the only basis upon which the Grand Jury returned the Indictment, thus rendering the Grand Jury proceedings and the Indictment thereunder upon which the judgments of conviction rest, unconstitutional and void.

5. Whether the Court of Appeals erred in affirming the order denying the motions made on behalf of Petitioners to grant suspension of execution of sentences and probation.

6. Whether, in the light of this Court's ruling in *Hamling* entitling Petitioners to all the benefits of *Miller*, and in light of the further fact that this Court affirmed the convictions on the assumption that the local and national standards were the same or similar, the ruling of the Court of Appeals upholding refusals to grant a new trial and to vacate the sentences and judgments of conviction even where the undisputed evidence established that the local standards in the crucial years were more tolerant than the national standards and the brochure was actually acceptable to the community in those years, arbitrarily deprives petitioners of their liberty and property in violation of the due process, fair trial and jury provisions of the Fifth and Sixth Amendments, inflicts cruel and unusual punishent in violation of the Eighth Amendment, and constitutes a failure to exercise supervisory jurisdiction over the true administration of criminal justice in the federal courts.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the Fifth, Sixth and Eighth Amendments; Title 28 U.S.C. §2255; Title 18 U.S.C. §3651; and Rules 32(e) and 33 of the Federal Rules of Criminal Procedure appear in Appendix B hereto.

Statement.

A. In 1971, the grand jury for the Southern District of California indicated the above named petitioners (hereafter referred to as "defendants") for alleged violations of Title 18 U.S.C. §§2, 371 and 1461. The indictment charged the unlawful dissemination of an Illustrated Report of the Commission on Obscenity

and Pornography and a brochure advertising the said Report. The jury could not agree with respect to the Report. The defendants were found guilty on the conspiracy counts and the counts charging the alleged obscenity of the brochure.

Judgments of conviction were affirmed by the Court of Appeals on June 7, 1973, and rehearing was denied on August 23, 1973. *United States v. Hamling, et al.*, 481 F.2d 307. On certiorari, the convictions were affirmed by this Court on June 24, 1974. *Hamling, et al. v. United States,* 418 U.S. 87. A petition for rehearing was denied on October 15, 1974. 95 S.Ct. 157.

Following affirmance, as aforestated, the defendants initiated three separate proceedings: the first, motions for new trial on the ground of newly discovered evidence, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure; the second, motions to vacate the sentences and judgments of conviction, made pursuant to Title 28 U.S.C. §2255; and the third, motions to suspend execution of sentences and to release defendants Hamling and Kemp on probation, made pursuant to Title 18 U.S.C. §3651 and Rule 32(e) of the Federal Rules of Criminal Procedure.

The aforesaid motions were denied by the Honorable Gordon Thompson, Jr., a judge of the United States District Court for the Southern District of California, on December 16, 1974, and separate appeals were filed from each of the orders denying the said motions.[1]

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[1]The separate appeals of the defendants from the orders denying the motions for new trial on the ground of newly discovered evidence under Rule 33, to vacate the sentences and judgments of conviction under §2255, and for suspension of execution of sentences and probation under §3651 and Rule 32(e) were ordered consolidated on appeal by the Court of Appeals on March 28, 1975.

Applications for stays and bail pending appeals were all denied by the district court. Thereafter, motions for bail pending appeals were filed on behalf of defendants in the Court of Appeals. On January 22, 1975, by orders of a motion panel of the Court of Appeals, execution of all sentences was stayed pending disposition of the appeals, with the further requirement that there be filed with the clerk of the district court bond or cash in an amount sufficient to pay the fines and costs should the judgments be affirmed. Such security was furnished.

B. On their motions for new trial in the district court, the defendants presented the affidavits of Gene Norman Levine [C.T. 1252-1289],[2] Jack Haberstroh [C.T. 1449-1470] and Stanley Fleishman [C.T. 1244-1251]. The affidavit of Dr. Levine demonstrated extensive experience and background in the areas of public opinion and attitude surveys. The affidavit revealed that in the years 1968-1970, when the charged conduct occurred, the San Diego community was more tolerant with respect to the depiction and representation of sexually explicit material than the population of the nation as a whole. Counsel was prepared at the time of the hearing on the motions for new trial to call Dr. Levine to testify [R.T. Supp. 43-44],[3] but the offer was rejected by the district court.

The affidavit of Professor Haberstroh, Assistant Professor of Advertising in the Journalism Department at San Diego State University, established that a number

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[2]The reference "C.T." is to the Clerk's Transcript on Appeal.

[3]The reference "R.T. Supp." is to the Reporter's Transcript of the proceedings relative to the hearing on the motions held on December 16, 1974, and the applications for bail pending appeals held in the district court on December 24, 1974.

of surveys conducted by him and some of his associates at the university, as well as by students under his supervision, resulted in findings that a substantial majority of the San Diego community believed that the brochure in question here should be available to the public in general. Professor Haberstroh, who testified in the trial of the cause herein initially, was then prepared to testify that the brochure did not go beyond the customary limits of candor in the San Diego area in the depiction or representation of sex and nudity and was not patently offensive to the local community standards. Professor Haberstroh was advised by counsel for the defendants at the time of the trial that while the court would accept him as an expert on social value, he could not qualify as an expert on national community standards, which were the only standards under which the case was being tried. Accordingly, his testimony at the trial had been limited solely to the question of "social value". In his affidavit in support of the motions for new trial, Professor Haberstroh stated that it was his opinion that the brochure was within local community standards and was within those standards at the time of trial. At the hearing on the motions for new trial, Professor Haberstroh was in the courtroom and prepared to testify [R.T. Supp. 28], but this offer was also denied by the district court.

In his affidavit, Stanley Fleishman, counsel in charge of the defense of the case from its inception up to the present time, affirmed that the case had been submitted to the grand jury, according to the testimony of government counsel, solely on the basis of national standards. The indictment charged only a violation of national standards, as indicated by the government's

response to defendants' motion for a bill of particulars. The government's sole witness on community standards was a Mr. Getlein of Washington, D.C., who spoke solely about national standards, admitting that he knew nothing of local standards. Had counsel been aware that the proper criterion was "local standards", he would have objected to the testimony of the government witness Getlein, since he was totally without qualifications on the issue of local standards. Counsel would have called local witnesses familiar with the Southern District of California area on behalf of defendants, rather than calling experts on national standards from distant places who were unfamiliar with local standards. Counsel had attempted to use a survey to establish that the brochure did not offend national standards (rejected by the trial judge); he would have utilized the same San Diego survey to establish that the brochure did not offend local contemporary community standards. Instead of solely relying upon the national survey prepared by the Commission on Obscenity and Pornography to establish that the brochure did not offend national standards, counsel would have obtained reputable surveys indicating that Californians overwhelmingly believed that government should not interfere with the right to circulate explicit sexual materials to adults. Local surveys could have been prepared on a scientific basis which would have been admissible as evidence. The information that defendants had available to them which established that the brochure did not offend local standards was, in the light of the government's

bill of particulars and the trial judge's position throughout the trial, inadmissible in evidence, and counsel was thus led to believe that local standards were irrelevant and that a national standard was the sole applicable test. Mr. Fleishman's affidavit also emphasized the significance of the affidavit of Dr. Levine which demonstrated that in the very period in which the alleged conduct occurred, the tolerance of the San Diego community for the depiction and representation of explicit sexual material was greater than the tolerance of the nation as a whole. Particular emphasis was placed on an exhibit attached to the affidavit of Dr. Levine which contained a report of the City Attorney of Los Angeles. The so-called Pines Report reflected a broad acceptance of explicit sexual material by adults in the Southern California area.

The affidavits of Dr. Levine, Professor Haberstroh and Stanley Fleishman, counsel, were all received into evidence by the district court, but as aforestated, the district court declined to permit any oral testimony by the affiants.

Also in the courtroom and prepared to testify were Virginia Carlsen, Tom Warren, Mr. Myers and Mr. Stonebrook, an investigator [R.T. Supp. 28]. Mr. Stonebrook was prepared to testify to the fact that there was significantly more explicit sexual material in the San Diego area and other areas of California than there was in the nation at large. Virginia Carlsen would have testified that she showed the brochure to 573 persons, asking them questions which indicated

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a significant acceptance by the community of the very brochure involved. The survey itself was offered into evidence. Tom Warren, one of Professor Haberstroh's students, would have testified that during the trial, under the guidance of Professor Haberstroh, he had canvassed the San Diego Area and purchased many books and magazines of sexually explicit nature, including material much more explicit than appears to have been available throughout the rest of the country, based upon the findings of investigator Stonebrook. Clarence Myers was prepared to testify that within the last month he had gone to 14 adult bookstores in the local area and purchased a number of sexually explicit books and magazines which were entirely comparable to magazines available in San Diego at the time of the trial [R.T. Supp. 44-47]. As heretofore stated, all offers of proof were rejected by District Judge Thompson, and the motions for new trial were denied, principally on the basis that this Court's opinion in *Hamling* had foreclosed all questions.

The motions to vacate the sentences and judgments of conviction made pursuant to 28 U.S.C. §2255 were similarly supported by affidavits and exhibits with similar offers of proof and similar rulings by the district court [C.T. 1421-1431]. The motions for suspension of execution of sentences and probation were also supported by affidavits and exhibits [C.T. 1305-1389, 1403-1420], with similar offers and similar rulings.

It should be emphasized that the government never offered any affidavits in opposition to these motions.

The record is therefore undisputed that in the crucial periods involved herein, the standards of the San Diego community were more tolerant than those of the nation as a whole, and the brochure here involved was acceptable to the local community.

C. The Court of Appeals below affirmed upon the basis that the evidence submitted by defendants was not "newly discovered", it appearing to the Court of Appeals that defendants were only trying to present the same case "under a different theory". In the view of the Court of Appeals, the district court was correct in holding that defendants' arguments "have already been considered and rejected by the Supreme Court". Thus, on appeal, the record remains undisputed that the local standards of the community at the time the defendants were tried were more tolerant than the national standards. Defendants Hamling and Kemp face imprisonment of four and three years, respectively, without the opportunity to present undisputed evidence which might have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.

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REASONS FOR GRANTING THE WRIT.

1. The case herein was tried in 1971 solely under the *Roth-Memoirs* standards. The charge made against these defendants in the indictment stressed the standards of the nation as a whole as the sole standard for judging the alleged obscenity of the brochure. Prior to trial, on the motion for a bill of particulars which requested the government to state what the defendants were charged with under the word "obscene" in the indictment, the government replied that implicit in an allegation of obscenity as to the advertisements was the allegation that said advertisements go substantially beyond customary limits of candor in the nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion. The constant emphasis throughout the trial, in the light of the charge in the indictment and the government's theory of the case, and in the light of the district court's own interpretation of the governing law as it stood at the time of the trial, was that the brochure here offended only national standards. The only oral testimony offered by the government's witness was with respect to national standards, and the witness concededly knew nothing about the local standards of San Diego. The only oral testimony which the trial judge permitted the defendants to present through their expert witnesses was solely on the issue of national standards, and no other. Thus, it was not merely the instructions given to the jury with respect to national standards, but the entire case from beginning to end before the jury was premised solely upon violations of a national standard. The trial judge constantly emphasized that no evidence with respect to the standards of San Diego would be admitted, and the instructions

to the jury reiterated what the lengthy trial had already made evident, that the standards of the community involved were the standards of the nation as a whole. See the dissenting opinion of Justice Brennan, 418 U.S. at 145-151, and fn. 3.

On certiorari, one of the arguments urged by defendants was that in light of the decision in *Miller*, rejecting the national standard as "unworkable", the federal statute had been rendered unconstitutionally vague. There was no dispute by the government before this Court that the entire case had been tried on the theory that the brochure offended the standards of the nation as a whole. The government urged upon this Court the following consideration:

> "The case was tried in the Southern District of California. *Petitioners could have benefited from the application of a local standard only on the unlikely hypothesis that the jurors would have found their own community more permissive than the nation as a whole.*" *Hamling, et al. v. United States*, No. 73-507, Brief for the United States, p. 30 (Emphasis added).

The majority opinion of this Court made the same assumption. While holding that the trial judge's instructions to the jury with respect to national standards were erroneous, the majority opinion held that the defendants were not materially prejudiced because even if references to a national standard had been omitted from the instructions, the result would have been the same. As Justice Brennan pointed out, the majority held "in effect that the local standards of jurors drawn from the Southern District of California could not possibly be more permissive than those of the Nation

as a whole". 418 U.S. at 151. This Court was not dealing with evidence which demonstrated that the standards of the San Diego community in the crucial period involved in the indictment were actually more tolerant than those of the nation as a whole and that the very brochure involved here was acceptable to the San Diego community. Such evidence was presented for the first time on the motions for new trial and to vacate the sentences and judgments under §2255, evidence it should be added, which on this record was undisputed.

It is submitted that without justification, the courts below have denied defendants' motions on the assumption that this Court somehow disposed of the questions here presented, when in reality these questions could not possibly have been presented to this Court at the time the case was argued on certiorari. Moreover, despite the fact that the evidence presented on the motions for new trial and the §2255 motions could not have been presented at the trial in the light of the governing law, the position of the prosecutor, and the definitive rulings of the trial court, still the courts below have declined to rule on the merits of defendants' applications by merely dismissing the undisputed evidence as "not newly discovered".

2. It should be noted initially that the majority opinion in *Hamling* held that "any constitutional principles enunciated in *Miller* which would serve to benefit petitioners must be applied in their case". 418 U.S. at 102. In *Davis v. United States*, 417 U.S. 333, this Court further held that a defendant in a §2255 proceeding was entitled to relitigate, on motion to vacate a judgment, an issue which was decided on direct appeal where there was an intervening change

of law, and the fact that the defendant's claim was grounded in the laws of the United States rather than in the Constitution, did not preclude its assertion in a §2255 proceeding. In fact, then, if the San Diego standards were more tolerant than those of the nation as a whole, defendants were entitled to the benefit of the standards of the local community before the trier of the facts.

Unless obscenity prosecutions have become *sui generis,* the rulings of the courts below can find no support in the decisional law. If "obscene" books and other media of communication are to be treated as contraband no different than drugs or gambling paraphernalia, then at the very least, it is submitted, the protective guarantees should not be less in obscenity prosecutions than those that are afforded in other criminal prosecutions. Even under the most civilized systems of law, injustices do arise, and courts have constantly corrected errors in order to vindicate the rights of an accused to procedural and substantive guarantees under the fundamental law. See, 8A Moore's Federal Practice ¶33.04, p. 33-27; 2 Wright, Federal Practice and Procedure: Criminal §557, p. 515.

The traditional rule has been that on a motion for new trial based on newly discovered evidence, the evidence must have been discovered since the trial; failure to learn of the evidence at the time of the trial was not due to defendants' lack of diligence; the evidence must be material to the issues at the trial and it must be of such nature that it would probably produce an acquittal in the event of retrial. Another criterion for the grant of a motion for new trial has arisen from the prosecutorial suppression cases. Appellate courts have reversed convictions in cases

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of willful suppression, even where the materiality of the evidence was not clear. Indeed, since the integrity of the judicial system is involved, the appellate courts have directed the grant of new trials even in cases where there has been no willful suppression. Finally, appellate courts have directed the grant of new trials on the ground of newly discovered evidence in the exercise of their supervisory jurisdiction, bottomed upon the power and duty of the appellate courts to guarantee to all accused the fair administration of criminal justice in the federal courts. See, *Griffin v. United States,* 336 U.S. 704; *Napue v. Illinois,* 360 U.S. 264; *Giglio v. United States,* 405 U.S. 150; *Mejia v. United States,* 291 F.2d 198 (9 Cir. 1961); *Newsom v. United States,* 311 F.2d 74 (5 Cir. 1962); *Delbridge v. United States,* 262 F.2d 710 (D.C. Cir. 1958); *United States v. Mele,* 462 F.2d 918 (2 Cir. 1972); *United States v. Miller,* 411 F.2d 828 (2 Cir. 1969).

In *Griffin v. United States, supra,* the defendant was initially convicted of first degree murder, his argument that he had acted in self-defense having proved unavailing. On a motion for new trial, the accused produced cogent evidence that the deceased did have a dangerous weapon in his pocket, which was unknown to the accused at the time of the altercation. The motion for new trial was denied by the district court and the Court of Appeals dismissed the appeal without passing on the question of whether or not such evidence of an uncommunicated threat was admissible at the trial. On certiorari, this Court remanded to the Court of Appeals to determine the issue of admissibility.

> "Were the Court of Appeals to declare that the controverted evidence was admissible accord-

> ing to the law prevailing in the District, it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." (336 U.S. at 708-709).

It should be noted that, after remand, the Court of Appeals held the evidence admissible and then, on the question as to whether the jury having the evidence would have attached significance to it, held that it would be too dogmatic to say that the jury would not have regarded that evidence as sufficient to raise a reasonable doubt.

3. The Court of Appeals below stated that evidence will not be deemed "newly discovered" simply because it appears in a different light under a new theory. However, defendants are not presenting facts under a "new theory". There has been a change in the law, and the highest court of the land has stated that defendants are entitled to any benefits which may accrue from a change in the law since defendants were caught in a period of transition. It is untenable to argue that the evidence offered by the defendants with respect to the greater tolerance of the local standards was not "new evidence" within the protective guarantees of the due process and fair trial provisions of the Constitution and the decisional law.

In *Smith v. Yeager*, 393 U.S. 122, the situation presented was as follows: A defendant, following a state court conviction, filed a petition for a writ of habeas corpus in the federal courts. The proceeding took place prior to the decision of this Court in *Town-*

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send v. Sain, 372 U.S. 293. During oral argument before the federal district court, petitioner's counsel relinquished an opportunity for an evidentiary hearing, believing that, under then existing law, an evidentiary hearing was to be exercised only in "unusual circumstances". The petition was denied. *Townsend v. Sain* substantially increased the availability of evidentiary hearings in habeas corpus proceedings, and made mandatory much of what had previously been within the broad discretion of the district court. The defendant again filed a petition for a writ of habeas corpus in the federal court. This Court held that petitioner had not waived his claim to an evidentiary hearing. The Court refused to presume that counsel had intentionally relinquished a known right or privilege when the right or privilege was of doubtful existence at the time of the supposed waiver.

In *United States v. Liquori*, 438 F.2d 663 (2 Cir. 1971), the defendant had been charged with violations of 21 U.S.C. §§173 and 174 and 26 U.S.C. §§4701, *et seq.* The government proved at the trial that the defendant had mailed the carton containing cocaine and marijuana to a friend in 1964, but no direct evidence showing that the marijuana and cocaine were illegally imported or that the defendant knew that they were illegally imported was introduced at the trial. Defendant, however, made no objection to the use of the statutory presumptions covering those elements of the crime charged, the governing law at the time of the trial having assumed the constitutional validity of the statute. Conviction was affirmed thereafter, but following the decisions of this Court in *Leary v. United States*, 395 U.S. 6, and *Turner v. United States*, 396 U.S. 398, the defendant filed a motion to vacate his

sentence under 28 U.S.C. §2255. The district court decided that *Leary* and *Turner* were to be given complete retrospectivity and vacated the judgment of conviction, and the court of appeals affirmed. The court held that the convictions were properly vacated on the authority of *Leary* and *Turner*.

The same principle was applied in a case where the defendant had entered a plea of guilty to unlawfully acquiring marijuana without paying the required transfer tax, in violation of the applicable federal statute. *Scogin v. United States*, 446 F.2d 416 (8 Cir. 1971). The Court of Appeals held that at the time the defendant entered his plea of guilty the Fifth Amendment defense to the prosecution had not yet been established. The court therefore was persuaded to conclude that the defendant should not be faulted for failing to anticipate the action of this Court.

In *United States v. Scott*, 425 F.2d 55 (9 Cir. 1970), the court, in reversing a conviction for knowingly receiving and facilitating the transportation and concealment of marijuana, knowing the same to have been imported contrary to law, held that the decision of this Court in *Leary*, partially invalidating the presumption of the federal statute that knowledge of illegal importation may be inferred from proof of possession, was fully retroactive on both direct and collateral attack.

> ". . . At the time of Scott's trial, there was a solid wall of circuit court authority, including our own, sustaining the presumption against constitutional attack. [Citations] An exception would not have produced any results in the trial court. Under these circumstances were we to insist that an exception be taken to save the point for ap-

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peal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency. We conclude that Scott's failure to except did not waive the point on appeal." (425 F.2d at 57-58).

This case was tried from beginning to end on only one theory, and that is that the brochure offended national standards only. The only oral testimony offered by the government's witness was with respect to national standards, and such government witness knew nothing about the local standards of San Diego. Defendants' expert witnesses were permitted to testify solely on the issue of national standards, and no other. The trial judge repeatedly emphasized that no evidence with respect to the standards of San Diego would be admitted. On appeal, the judgments of conviction were affirmed solely on the basis of *Roth-Memoirs* standards. Before this Court, the government affirmed that defendants could have benefited from the application of a local standard only on "the unlikely hypothesis that the jurors would have found their own community more permissive than the nation as a whole". There can be no dispute that court and counsel accepted as governing law that the alleged obscenity of the brochure was to be measured solely by national community standards and that proof with respect to whether or not the brochure offended the standards of the community and vicinage from which the jury came was explicitly excluded. Under such circumstances, it is

submitted that under the decided cases defendants clearly presented newly discovered evidence.

4. The government argued below that the jurors at the trial may have disregarded the instructions with respect to national standards and applied their own version of the standards of the San Diego community and that there was no reason to believe that the introduction of the evidence offered by the defendants would have led the jury to a contrary result. Such arguments, it is submitted, are untenable and disregard constitutional guarantees of fair trial and due process, as well as the interpretive decisions of this Court.

In the first place, it must be recalled that the jury was never instructed with respect to the application of the standards of the community or vicinage from which they were drawn, but, on the contrary, were told again and again to be guided solely by the testimony with respect to national standards. It must be presumed that the jury did its duty as instructed by the court. It must be presumed that when the jury saw the government prosecutor constantly insisting that the testimony of his own witnesses was being offered solely on national standards, and constantly objecting to any evidence by the defendants on local standards, under such circumstances the jury excluded from its consideration the particular standards of the San Diego community from which they were drawn. See, *Bruno v. United States*, 308 U.S. 287.

In the second place, the notion that a court or prosecutor may substitute his judgment for that of a jury with respect to evidence which the jury alone may consider undermines the right of an accused in a criminal case to a fair trial by a jury in accordance

with the fundamental law. *Bollenbach v. United States,* 326 U.S. 607; *Weiler v. United States,* 323 U.S. 606; *Yates v. United States,* 354 U.S. 298; *Kotteakos v. United States,* 328 U.S. 750; *Wilson v. United States,* 250 F.2d 312 (9 Cir. 1958); *Samuel v. United States,* 169 F.2d 787 (9 Cir. 1948); *Little v. United States,* 73 F.2d 861 (10 Cir. 1934).

In the third place, such government arguments disregard the very standards newly enunciated in *Miller* and *Hamling*. If a juror on the one hand is barred from applying his own personal standards in evaluating material, but must draw on knowledge of the community or vicinage from which he comes, it appears clear that the jury is entitled to receive such evidence as will assist the jury in determining the issues which they have to decide. A companion case decided at the same time as *Miller* (*Kaplan v. California,* 413 U.S. 113) held specifically that while there was no constitutional need for expert testimony on behalf of the prosecution, "the defense should be free to introduce appropriate expert testimony". 413 U.S. at 121. In *Hamling,* this Court reiterated that the defendants should be free to introduce evidence on the issue of contemporary community standards to assist the jury in the resolution of that issue. 418 U.S. at 106. Here, the defendants have presented substantial and material evidence establishing that in the crucial period the standards of the Southern District of California were more tolerant than the nation as a whole, and the community actually accepted the brochure involved herein. In the light of the decisions of this Court, the defendants should plainly have the opportunity to present this evidence to a jury. See also, *Washington v. Texas,* 388 U.S. 14; *Chambers v. Mississippi,* 400 U.S. 284.

Finally, it should be noted in this connection that it was this Court itself in *Miller* which stressed the importance of the jury in obscenity prosecutions. The Court stated that such questions as "patent offensiveness" or "prurient interest" are "essentially questions of fact" and that it was "neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". 413 U.S. at 32. The rulings of the court below have deprived these defendants of a right to present evidence to a jury, a result which seriously undermines the historic purpose of a jury in criminal cases. This Court recently affirmed that the purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge "against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 95 S.Ct. 692, 698.

5. For similar and additional reasons, the motions to vacate the sentences and judgments of conviction pursuant to 28 U.S.C. §2255 should have been granted. The history and purpose of §2255 has been detailed in opinions of this Court. *United States v. Hayman*, 342 U.S. 205; *Machibroda v. United States*, 368 U.S. 437; *Kaufman v. United States*, 394 U.S. 217. The statute is to be liberally construed in light of its background and history, the section having been intended to include all of the procedural and substantive guarantees implicit in the Great Writ. The provision of federal collateral remedies rests fundamentally upon a recognition that adequate protection of constitutional rights

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relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal defendants than it is for state defendants. The issue in both state and federal habeas corpus proceedings is not whether relitigation is necessary, but whether one adequate litigation has been afforded in the light of the law and the Constitution.

The circumstances under which a federal court may review constitutional claims include a substantial allegation of newly discovered evidence. *Kaufman v. United States*, 394 U.S. at 226. It is plain that defendants were not afforded adequate litigation on the crucial issue of whether the brochure offended contemporary local standards. The foregoing discussion has established, it is submitted, that the evidence which was presented by defendants was substantial, undisputed, and newly discovered, and if presented to a jury would probably have resulted in a verdict of acquittal. It was not until the change in the law was enunciated in *Hamling* that defendants, for the first time, learned that they were entitled to receive the benefits of the local standards test. Promptly upon learning of this change in the law, defendants obtained the evidence with respect to local community standards and presented such evidence to the district court, both on their motions for new trial on the ground of newly discovered evidence and on the §2255 motion. Since the government never presented any evidence at the trial other than with respect to national standards, and since the defendants were compelled to limit their proof solely with respect to national standards, it would be fundamentally unfair to deny defendants the relief to which they are entitled under the Court's ruling, when the evidence shows clearly that the brochure would probably not have

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offended San Diego standards and that the jury might have acquitted defendants. There was a solid wall of authority holding that national standards were the sole standards to be used in federal obscenity prosecutions, and it would be unfair and unjust to deny an accused the right to present evidence of greater tolerance in the local community, where a change in the law had for the first time afforded such opportunity to the defendants.

Moreover, defendants claim that the indictment returned by the grand jury was fatally defective in the light of the response by the government to the motion for a bill of particulars that the indictment charged only that the brochure went substantially beyond customary limits of candor in the nation as a whole. The prosecutor stated in the §2255 habeas proceeding in the district court below: "Now, very briefly on this question of the invalidity of the indictment, certainly, there is no question how the grand jury was charged in this case; they were charged national standards." [R.T. Supp. 71]. It is established that a bill of particulars, once obtained, concludes the rights of all parties who are to be affected by it, and the party who has furnished the bill of particulars must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a pleading. See, *United States v. Halseth,* 342 U.S. 277. See also, *United States v. Neff,* 212 F.2d 297, 309 (3 Cir. 1954). Thus, the defendants were tried under a charge which, in the light of the decisions in *Miller* and *Hamling,* failed to state the essential elements of the federal offense. If defendants were entitled to all the benefits of *Miller,* as this Court ruled in *Hamling,* then the indictment returned

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by a grand jury which never considered or charged the violation of local standards was fatally defective, and a motion under 28 U.S.C. §2255 was appropriate. The grand jury never received the appropriate standard for judging the alleged obscenity of the material. While the brochure itself may have been before the grand jury, it is impossible for courts to know what the grand jury might have decided had the prosecutor correctly advised members of the grand jury that probable guilt could not be found unless the brochure offended the standards of the Southern District of California. This is an importantly crucial issue here because the undisputed evidence establishes that the standards of the Southern District of California were more tolerant than those of the nation as a whole. See, *Stirone v. United States,* 361 U.S. 212; *United States v. Basurto,* 497 F.2d 781 (9 Cir. 1974); *United States v. Goldstein,* 502 F.2d 526 (3 Cir. 1974).

It is fundamental, of course, that an indictment found by a grand jury is indispensable to the power of the district court to try an accused for the crime for which he was charged. In the case herein, the grand jury was never advised that probable guilt could only be found if the brochure substantially exceeded the standards of the Southern District of California. Instead, they were only told by the prosecutor that they were to measure the brochure by the standards of the nation as a whole. Thus, the grand jury never lawfully found probable guilt and the indictment never charged an essential element of the offense, to wit, violation of the local community standards of the community and vicinage from which the grand jury was drawn. *Ex parte Bain,* 121 U.S. 1; *Russell v. United States,* 369 U.S. 749. The indictment returned by the

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grand jury was fatally defective. The issue here presented was not discussed in *Hamling*, and could not have been. A motion under §2255 is, it is submitted, proper where a judgment of conviction rests upon a void and invalid indictment.

6. The motions for suspension of execution of sentence and probation, pursuant to 18 U.S.C. §3651 and Rule 32(e) of the Federal Rules of Criminal Procedure, should have been granted in the light of the developing standards for the administration of criminal justice and the cruel and unusual punishment provisions of the Constitution.

The defendants Hamling and Kemp, respectively, moved for suspension of execution of sentences and probation pursuant to 18 U.S.C. §3651 and Rule 32(e) of the Federal Rules of Criminal Procedure. The affidavit of defendant Hamling [C.T. 1309-1324] set forth the salient factors of age, educational background, family relationships and obligations, community activities, charities, health, and other related matters which bear importantly in support of the motion. The defendant Hamling had never been convicted of an offense prior to the one here involved. In the papers in support of the motion of defendant Kemp [C.T. 1404-1420], it was also established that defendant Kemp had never had any prior convictions of any type. The defendant Kemp submitted an affidavit of defendant Hamling which in essence stated that the said defendant Kemp had nothing to do with the selection of the pictures for the advertising brochure, nor was he consulted regarding the material or have anything to do with the decision to mail the brochure. Other affidavits presented on behalf of defendant Kemp indicated that the brochure was prepared by defendant

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Hamling and not defendant Kemp, and that defendant Kemp's veracity had been tested by a licensed polygraph examiner.

The case presented by the defendants, therefore, was one in which neither had been convicted of any offense prior to the conviction herein. There was no risk that either defendant would commit another crime. The conduct upon which the convictions rested did not cause or threaten any harm, and defendants never contemplated that the conduct herein would cause or threaten any harm. The defendants were caught in a period of transition and, while their convictions have been affirmed, three Justices of this Court believed that the defendants were denied a fair trial, a fourth Justice believing that the brochure was entitled to constitutional protection. The defendants have been law-abiding individuals, with strong ties to the community and with family lives which are sound and wholesome. Imprisonment will entail excessive hardship to themselves and their dependents.

The American Bar Association, in its report on Standards Relating to the Administration of Criminal Justice, has recommended that probation should be the norm where sentencing procedures are involved. Probation, it is stated, affirmatively promotes rehabilitation, avoids the stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community, greatly reduces the financial costs to the public treasury of an effective correctional system, and minimizes the effect of the conviction upon innocent dependents of the offender. Thus, the uniform trend is the avoidance of confinement where the facts in the case indicate

that the interests of justice and the interests of the public and the defendant will be satisfied by permitting the defendant to remain in the community where the opportunities for reintegration and rehabilitation are greater and the expense to the public by enforced incarceration is considerably diminished. *Woosley v. United States,* 478 F.2d 139 (8 Cir. 1973); *United States v. Barber,* 456 F.2d 579 (3 Cir. 1972); *United States v. Daniels,* 429 F.2d 1273 (6 Cir. 1970). See also, *American Bar Association Project on Standards for Criminal Justice: Standards Relating to the Administration of Criminal Justice,* "Sentencing Alternatives and Procedures", pp. 335-380; "Probation", pp. 381-405; "Appellate Review of Sentence", pp. 407-422.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioners.

SAM ROSENWEIN,
LOUIS S. KATZ,
Of Counsel.

APPENDIX A.

Judgment and Opinion of the Court of Appeals.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., Library Service, Inc., Appellants. Nos. 75-1057, 75-1058, 75-1037, 75-1039, 75-1038, 75-1016, 75-1010.

William L. Hamling, Appellant, v. United States of America, Appellee. No. 75-1060.

Appeal from the United States District Court for the Southern District of California.

Before: BARNES and KENNEDY, Circuit Judges, and *CARR, District Judge

PER CURIAM:

Appellants were convicted in December 1971 for mailing and conspiring to mail obscene matter in violation of 18 U.S.C. §§ 2, 371, & 1461. This court affirmed the convictions in June 1973, and the opinion fully sets forth the evidence. 481 F.2d 307. The Supreme Court granted certiorari, 414 U.S. 1143, and affirmed the convictions in June 1974, 418 U.S. 87.

Appellants subsequently made three motions in the district court. They sought: (1) a new trial, on the basis of newly discovered evidence; (2) dismissal of the indictment; and (3) modification or suspension of their sentences. The district judge who presided at the original trial denied each of these motions. We affirm his rulings.

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*Honorable Charles H. Carr, United States District Judge, District of Central California, sitting by designation.

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The alleged newly discovered evidence consists of affidavits and supporting surveys showing that community standards for printed material in the San Diego area were more tolerant than the national standards considered at trial. One of the surveys, supporting the affidavit of Professor Jack Haberstroh of San Diego State University, was conducted prior to trial by one of his students, a Ms. Carlsen. Defendants unsuccessfully sought to introduce evidence of this particular survey at the original trial. Other surveys, including one conducted by the Institute for Survey Research at Temple University, were cited in the affidavits as further support for the experts' opinions. The district court's characterization of this evidence as either cumulative or not newly discovered, or both, is supported by the record.

Appellants argue that even if the statistical data contained in three surveys were available at the time of trial, the significance of such data was not apparent until later when the Supreme Court decided *Miller v. California,* 413 U.S. 15 (1973). The *Miller* case makes reference to local standards, and appellants contend that this new emphasis gives the surveys a meaning they did not have at trial. An affidavit by the defense counsel states that his trial strategy would have been completely different if he had foreseen the *Miller* decision.

Evidence will not be deemed "newly discovered" simply because it appears in a different light under a new theory.

> [A] party who desires to present his case under a different theory in which facts available at the original trial now first become important, will not be granted a new trial.

6A J. Moore, Moore's Federal Practice 59-117 (1973) (footnote omitted). And in the case before us, the arguments made by appellants have already been considered and rejected by the Supreme Court. 418 U.S. at 103-10. The Supreme Court affirmed the convictions in these cases based on its review of the entire record. The Carlsen survey was specifically discussed. *Id.* at 108. We join the trial judge in his statement that "it is not up to this court nor any court to overrule any statement of the Supreme Court with respect to a matter that it has before them and with respect to which they have made a specific finding. . . ."

The trial court was further correct in denying the two additional motions made by defendants. The motion to dismiss the indictment was based on the same local standards argument made in support of the motion for new trial. As to the trial court's denial of appellants' motions for suspension and modification of sentence, we find no error. The sentences were within the statutory maximum, and there is no legal cause in this case for appellate review of the trial court's judgment.

Because all of the appellants' contentions have been fully resolved by previous orders, the Clerk is directed to issue this court's mandate forthwith. No petition for rehearing will be entertained.

AFFIRMED.

APPENDIX B.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law . . ."

2. The provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

4. The provisions of Title 28 U.S.C. §2255 are:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collat-

eral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (June 25, 1948, c. 646, § 1, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.)

5. The pertinent provisions of Title 18 U.S.C. §3651 are:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not

exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

* * *

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. (June 25, 1948, c. 645, § 1, 62 Stat. 842; June 20, 1958, P. L. 85-463, § 1, 72 Stat. 216; Aug. 23, 1958, P. L. 85-741, 72 Stat. 834; Oct. 22, 1970, P. L. 91-492, § 1, 84 Stat. 1090; May 11, 1972, P. L. 92-293, § 1, 86 Stat. 136.)

6. The provisions of Rule 32(e) of the Federal Rules of Criminal Procedure are:

"After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law."

7. The provisions of Rule 33 of the Federal Rules of Criminal Procedure are:

"The court on motion of a defendant may grant a new trial to him if required in the interest

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of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended Feb. 28, 1966, eff. July 1, 1966."

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-796

WILLIAM L. HAMLING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they are entitled to new trials on the basis of newly discovered evidence and that the indictment must be dismissed because the grand jury that returned it considered "national standards" rather than "local community standards." Petitioners Hamling and Kemp also claim that they should have been sentenced to probation.

After a jury trial in 1971 in the United States District Court for the Southern District of California, petitioners were convicted of twelve counts of mailing and conspiring to mail an obscene advertisement, in violation of 18 U.S.C. 2, 1461 and 371. Petitioner Hamling was sentenced to one year's imprisonment on the conspiracy count, to be followed by concurrent terms of three years' imprisonment on each of the eleven substantive counts; he was also fined $32,000. Petitioner Kemp was sentenced

to imprisonment for one year and a day on the conspiracy count, to be followed by concurrent terms of two years' imprisonment on each of the eleven substantive counts, all subject to immediate parole eligibility pursuant to 18 U.S.C. 4208(a)(2). Petitioners Wright and Thomas received suspended sentences of one and one-half years and were placed on probation for five years. Petitioners Reed Enterprises, Inc., and Library Service, Inc., were fined $43,000 and $12,000, respectively. The court of appeals affirmed. 481 F.2d 307. After plenary review this Court affirmed on the merits. 418 U.S. 87.

Petitioners then filed motions for a new trial and to vacate their convictions, pursuant to 28 U.S.C. 2255 and Fed. R. Crim. P. 33. Petitioners Hamling and Kemp also moved to suspend their sentences and requested probation under 18 U.S.C. 3651 and Fed. R. Crim. P. 32(e). The district court denied these motions and the court of appeals affirmed (Pet. App. A; 525 F.2d 758).

The evidence at petitioners' trial, which is summarized in this Court's prior opinion (418 U.S. at 91-96), established that petitioners mailed approximately 55,000 brochures advertising a publication entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography."

> The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction

> of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with the other's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina. [481 F.2d at 316-317.]

Petitioners' trial occurred prior to the decision in *Miller* v. *California*, 413 U.S. 15. This Court held, *inter alia*, that the standards established in *Miller* did not require the reversal of petitioners' convictions (418 U.S. at 101-117).

1. Petititioners contend that they are entitled to a new trial on the basis of "newly discovered" evidence. They contend that they could prove that the contemporary community standards of the San Diego area, where they were tried, are more tolerant of sexual literature than are national standards, and that the brochure is acceptable to San Diego residents. This evidence, however, was available to petitioners at the time of trial and therefore is not newly discovered. Moreover, the district court properly found that the evidence would have been merely cumulative to evidence introduced at trial and could not have influenced the jury (H. Tr. 43).[1]

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[1]Judge Thompson, who denied petitioners post-trial motions, was the trial judge in this case.

"Tr." refers to the thirty-one volume transcript of the trial. "H. Tr." refers to the one volume transcript of the hearing on petitioners' post-trial motions on December 16 and 24, 1974.

The evidence consisted of two affidavits.[2] One affidavit, by Jack Haberstroh (who had testified as a defense witness at petitioner's trial (Tr. 3941-4045)), expressed the opinion that the brochure does not go beyond the customary limits of candor in the San Diego community and that it is not patently offensive to local community standards. That opinion was based upon a survey conducted by Haberstroh's student, Virginia Carlsen, in which the brochure was shown to selected residents of San Diego. In the second affidavit Dr. Gene Norman Levine stated his opinion that the San Diego community is more tolerant than the nation toward explicit materials. That opinion is based upon a portion of a 1970 survey relating to attitudes toward sexual materials in which the responses of San Diego residents are compared to responses to a national survey.

In part, petitioners' contention that these affidavits require a new trial has already been rejected by this Court. The Carlsen survey discussed in the Levine affidavit was offered but not admitted at trial (Tr. 3923-3933). This Court specifically held that the exclusion of that evidence did not constitute reversible error. 418 U.S. at 108-110. The Haberstroh affidavit merely presents the same sort of evidence through a different light; that evidence is neither

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[2]In a third affidavit petitioner's trial counsel stated that his trial strategy would have been different if he had known that local rather than national standards were to be applied, and that a verdict of not guilty or a hung jury would have resulted had the trial occurred under local standards. That affidavit, however, presented no evidence in support of its assertions.

newly discovered nor sufficient to justify repetitious review by this Court.[3]

2. Petitioners claim (Pet. 25-27) that the indictment is defective because the grand jury did not consider the brochure here in light of the local standards test of *Miller*. The court below correctly observed that this is the same contention asserted by petitioners in seeking a new trial (Pet. App. 3). If, as we submit, petitioner's convictions are valid, then the indictment is valid.

Petitioners also assert that the failure of the indictment to charge that the brochure was offensive to "community standards" requires dismissal of the indictment for failure to charge an essential element of the offense. This claim has been rejected by this Court, which held (418 U.S. at 119) that the "constitutional definition of obscenity need not be alleged in the indictment."

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[3]To the extent that Haberstroh's opinion is based on the survey of materials available in the San Diego area, we note that the "[m]ere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." *United States* v. *Manarite*, 448 F.2d 583, 593 (C.A. 2), certiorari denied, 404 U.S. 947 (quoted at 418 U.S. at 126). In any event, "[t]he District Court permitted Dr. Wilson, one of the four expert witnesses who testified on behalf of petitioners, to testify as to materials he found available in San Diego, as a result of having spent several days there. Tr. 3575." 418 U.S. at 109. Evidence of comparable materials is thus merely cumulative. Petitioners quote (Pet. 13) our statement (Br. for the United States at 30 in No. 73-507) that "[p]etitioners could have benefited from the application of a local standard only on the unlikely hypothesis that the jurors would have found their own community more permissive than the nation as a whole." While a showing of more tolerant local standards raises the possibility of benefit to petitioners, the district court has found that the evidence of local standards would not benefit petitioners here. In light of that finding, our present position is not inconsistent with the prior statement.

3. Petitioners Hamling and Kemp contend (Pet. 27-29) that they should not have been sentenced to imprisonment. The sentences, however, are well within the statutory maxima. Appellate review of their severity is therefore unavailable. *Dorszynski* v. *United States*, 418 U.S. 424, 431.

Petitioners' claim (Pet. 4), which is not elaborated upon in the petition, that their imprisonment is cruel and unusual punishment, appears to be concerned with matters appropriate for consideration by the sentencing judge in determining the proper penalty. Nothing relied upon by petitioners raises a constitutional issue in this regard. Cf. *Badders* v. *United States*, 240 U.S. 391.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.